

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DANIEL HARVEY RIGGS,

Petitioner,

v.

NETHANJAH BREITENBACH, et al.,¹

Respondents.

Case No. 3:21-cv-00071-ART-CSD

MERITS ORDER

Petitioner Daniel Riggs filed a First Amended Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (“Petition”) raising four grounds for relief from his attempted-sexual-assault convictions: (1) invalid nolo contendere plea caused by prosecutorial misconduct; and (2) ineffective assistance of trial counsel during plea negotiations in failing to inform him that (a) one victim has a medical condition affecting her brain, (b) a different victim made inconsistent statements to investigators, and (c) videos of him engaging in rough but consensual sex with his former girlfriend would be inadmissible at trial. (ECF No. 28). For the reasons discussed below, this Court denies the Petition and a certificate of appealability.

I. BACKGROUND**A. Factual background²****1. Victim Megan L. (state criminal case CR13-1067)**

Megan testified before the grand jury that she attended the University of Nevada, Reno, until 2007 when she was diagnosed with a non-traumatic brain

¹ The Nevada Department of Corrections inmate database states that Riggs is incarcerated at Lovelock Correctional Center. Nethanjah Breitenbach is the current warden for that facility. At the end of this order, this Court directs the Clerk of the Court to substitute Nethanjah Breitenbach for Respondent Timothy Filson. See Fed. R. Civ. P. 25(d).

² This summary is merely a backdrop to the Court’s consideration of the issues in the Petition and should not be construed as credibility or fact findings.

1 injury caused by a spinal fluid leak in her brain that affects her long-term
2 memory. (ECF No. 55-2 at 8). Megan is “very high functioning” for her diagnosis,
3 which means that she can “carry on a conversation” and “remember things well.”
4 (*Id.* at 8–9).

5 Megan returned to Reno in June 2009 to attend a friend’s bachelorette
6 party and meet with Riggs who ran in her group of college friends and had
7 befriended her on social media. (*Id.* at 10–11). Megan told Riggs that she was
8 looking for a long-term relationship and not interested in sex for a while. (*Id.* at
9 12). Megan met Riggs in the lobby of her hotel on June 20th and the two went for
10 drinks at the Hideout bar. (*Id.* at 13–14). Riggs returned Megan to her hotel, and
11 she departed to Rum Bullions with the bachelorette party. (*Id.* at 15).

12 Riggs unexpectedly showed up at Rum Bullions claiming he was there with
13 friends, but Megan saw none. (*Id.* at 16). Megan didn’t tell Riggs she’d be there;
14 she wasn’t planning the party and didn’t know where they’d go. (*Id.* at 30). Riggs
15 repeatedly approached the bachelorette group with drinks for Megan, but she
16 refused and handed them to other people. (*Id.* at 16). The bachelorette group
17 seemed to enjoy Riggs’s company and he was very charismatic. (*Id.*)

18 Megan didn’t see Riggs drink much and he didn’t seem intoxicated. (*Id.* at
19 32). At the end of the night, Megan and Riggs agreed they wanted to keep talking.
20 (*Id.* at 16). Megan suggested her hotel room where she’d feel more comfortable
21 because there wasn’t any alcohol there. (*Id.* at 17).

22 When they arrived at the hotel room, Megan again told Riggs that she did
23 not want to have any form of sexual contact with him, which he said was fine.
24 (*Id.*) The two talked and played cards for an hour and then began to kiss on the
25 bed. (*Id.* at 18). Riggs undressed Megan to her underwear, stood and fully
26 undressed himself, mounted Megan, clamped his hand on her neck, pulled her
27 underwear to the side, and tried to insert his penis into her vagina. (*Id.*)

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1 Riggs's hand was so tight on Megan's throat that she couldn't scream and
2 had trouble breathing. (*Id.* at 19). Megan told Riggs no, she didn't want to do this.
3 (*Id.*) He responded, "What did you expect?" (*Id.*) And asked Megan if she wanted
4 to feel the tip or feel it inside of her. (*Id.*) She kept refusing: "At least five no's and
5 several, 'Don't do this. I don't want you to do this.'" (*Id.*)

6 Riggs had partially penetrated her vagina, it burned, and she pushed
7 against Riggs's chest, but he just fell back in place. (*Id.*) She sat up on the bed,
8 but Riggs stuck his penis into her mouth, grabbed the back of her head and hair,
9 and thrust his penis back and forth in her mouth. (*Id.* at 19–20). He thrust so
10 hard that it hurt and caused her to vomit on him. (*Id.* at 20).

11 Riggs let Megan clean herself in the bathroom. (*Id.* at 21). When she
12 returned Riggs was masturbating and he pushed her face down to suck on his
13 testicles, ejaculated on her face, and fell asleep. (*Id.* at 22). Panicked, Megan
14 remained in the room until Riggs woke around 6 or 7 the next morning. (*Id.* at
15 23).

16 Megan told Riggs that he'd hurt her physically and emotionally. (*Id.*) Riggs
17 coldly responded he was so drunk he didn't remember what he'd done and then
18 placed Megan's hand on his erect penis. (*Id.* at 23–24). Megan again said she
19 didn't want to have sex, but he pushed her down, shoved her underwear aside,
20 and shoved his penis fully into her vagina. (*Id.* at 24–25). He choked her harder
21 this time but didn't cause her to pass out. (*Id.* at 25). Megan kept saying no and
22 don't do this, but Riggs showed no emotion. (*Id.*) He pulled out of her vagina and
23 used her breasts to masturbate. (*Id.*) Megan kept saying no. (*Id.*) Riggs thrust his
24 penis into her mouth and ejaculated. (*Id.*)

25 Shocked and running on auto pilot, Megan agreed to drive Riggs home. (*Id.*
26 at 26). When Megan declined his offer to date, he said "You know that you are
27 better than me. You are smarter than me and you are funnier than me. And that's
28 why I had to do this." (*Id.* at 26–27). Megan returned home and reported the crime

1 to the Sacramento Police Department. (*Id.* at 27). The police collected evidence,
2 including the underwear Megan wore during the assault. (*Id.*)

3 Riggs texted Megan to see her again. (*Id.* at 28). She said that she'd
4 contacted the police and to stop contacting her. (*Id.*) He repeatedly called her after
5 the text exchange. (*Id.*) She didn't take his calls and eventually obtained a
6 restraining order against him. (*Id.*)

7 **2. Victim Kayla H. (state criminal case CR13-1364)**

8 Kayla testified before the grand jury that in 2013 she lived in Sparks,
9 Nevada, with her parents, her sister, her sister's boyfriend, and her four-year-old
10 daughter. (ECF No. 55-1 at 8). Kayla and Riggs had attended the same high
11 school and were acquaintances. (*Id.* at 9). They became reacquainted after
12 graduation through a dating website and planned a date for February 24th to
13 watch a movie at Kayla's house after her daughter fell asleep. (*Id.* at 9–10).

14 Kayla didn't dress up for the date; she wasn't trying to have any kind of
15 sexual interaction. (*Id.* at 12). They watched a scary movie that Riggs had
16 selected. (*Id.*) Kayla had one beer. (*Id.*) Riggs kept trying to get her to drink more
17 but she didn't feel comfortable and refused. (*Id.*) Riggs got Kayla a vodka and
18 cranberry drink from his Subaru anyway. (*Id.* at 13). Kayla took a couple of baby
19 sips to stop Riggs pestering her about it. (*Id.*) Then he brought up the topic of
20 Brianna Denison who had been murdered by James Biela. (*Id.*) Riggs kept saying
21 that Biela strangled his victims before raping them and Brianna died because she
22 was so petite. (*Id.*) Kayla, who is also petite, got scared. (*Id.* at 14).

23 Riggs then rubbed Kayla's leg, grabbed her face, and leaned in to try to kiss
24 her. (*Id.*) Kayla didn't want that to happen, so she got up and checked on her
25 daughter who was sleeping in Kayla's bedroom. (*Id.* at 14–15). Kayla saw Riggs
26 just standing there as she walked out of the room. (*Id.* at 15). He tried to remove
27 her clothing as he guided her toward the closet in the room. (*Id.*) Kayla didn't
28 resist because she was afraid Riggs would hurt her daughter. (*Id.*)

1 Riggs undressed Kayla and himself in the closet, laid them down, placed
2 his hand around her throat, and started having vaginal sex with her. (*Id.* at 16).
3 Kayla could barely breathe and was afraid. (*Id.*) Riggs kept putting his fingers into
4 Kayla's throat, gagging her. (*Id.* at 16–17). She bit him but Riggs only thrust his
5 fingers further into her throat. (*Id.*) The sex was painful and forceful; Riggs injured
6 her spine. (*Id.*) But Kayla kept quiet, hoping her daughter wouldn't wake and
7 would be kept safe. (*Id.*)

8 Riggs pulled out, turned Kayla onto her knees, and put his penis into her
9 anus. (*Id.* at 18). Kayla then repeatedly said, "No, please stop. Please." (*Id.*) She
10 was crying but Riggs kept going for at least five minutes. (*Id.*) Then Riggs grabbed
11 Kayla's face and shoved his fingers into her mouth, opened her teeth, and forced
12 his penis and testicles inside her mouth. (*Id.* at 18–19). Although Kayla had
13 vomited and was crying and turning her head away, Riggs kept thrusting into her
14 mouth. (*Id.* at 19). Kayla could not escape because Riggs held her with both
15 hands. (*Id.*)

16 Riggs eventually stopped, masturbated, and ejaculated onto Kayla's face.
17 (*Id.* at 20). He got dressed, told Kayla her back looked like it hurt and she should
18 do something about it, and left. (*Id.*) Kayla called a friend and then reported the
19 crime to the police. (*Id.*) She was examined by a Sexual Assault Forensic
20 Examiner early the next morning. (*Id.* at 20–21). The nurse reported abrasions
21 and bruising on both of Kayla's knees, friction abrasions on her spine, intense
22 redness and bruising on the uvula part of her mouth, hemorrhaging of the area
23 behind the uvula, lacerations on her anus, redness and bruising in her rectum,
24 and intense redness and bruising on her cervix, all indicative of forceful oral,
25 vaginal, and anal intercourse. (*Id.* at 33–38).

26 Days later at the detective's request, Kayla texted Riggs to speak with her
27 on the phone. (*Id.* at 21, 26–28). During the call, Riggs apologized and said they
28 had both been drinking and he'd kept his penis in Kayla's anus after she asked

1 him to stop for only a few seconds—because he counted—but he’ll “buy that” if
2 she wanted to say it was a couple of minutes. (*Id.* at 22, 28–29). Police overheard
3 the discussion because Kayla’s phone was on speaker. (*Id.* at 22, 28–29).

4 **B. Procedural background**

5 The State of Nevada charged Riggs with two counts of sexual assault and
6 one count of battery with the intent to commit sexual assault pertaining to Megan
7 in C13-1067 and one count of attempted sexual assault pertaining to Kayla in
8 CR13-1364. (ECF Nos. 34-24, 34-31). In August 2013, Riggs pled no contest to
9 one count of attempted sexual assault in each case. (ECF Nos. 34-32, 36-23, 36-
10 24). After the trial court denied Riggs’s motion to withdraw his no-contest plea in
11 CR13-1067, it sentenced him to a minimum term of 96 months to a maximum
12 term of 240 months for attempted sexual assault and credited him with 161 days
13 for time served. (ECF Nos. 34-37, 55-10, 36-23). After the trial court denied
14 Riggs’s motion to withdraw his no-contest plea in CR13-1364, it sentenced him
15 to a minimum term of 96 months to a maximum term of 240 months, to be served
16 consecutive to the sentenced imposed in CR13-1067, and it credited him with 35
17 days for time served. (ECF Nos. 34-38, 55-10, 36-24). Riggs’s amended
18 judgments of conviction were entered on December 24, 2013. (ECF Nos. 36-23,
19 36-24).

20 Riggs appealed, (ECF Nos. 36-25, 36-28), and the Nevada Court of Appeals
21 affirmed the convictions. (ECF No. 37-35). The Nevada Supreme Court denied
22 Riggs’s petitions for review. (ECF Nos. 37-39, 37-40). And remittitur issued in
23 both cases on April 8, 2015. (ECF Nos. 37-41, 37-42).

24 Riggs filed pro se state post-conviction habeas petitions on March 8, 2016,
25 (ECF Nos. 37-50, 38-1), which he amended on April 19, 2016. (ECF No. 38-2).
26 After Riggs was appointed counsel, he filed supplemental petitions on March 16,
27 2018. (ECF Nos. 38-38, 38-39). The state court denied post-petition relief on April
28 5, 2019. (ECF Nos. 39-5, 39-6). Riggs appealed, the cases were consolidated on

1 appeal, and the Nevada Court of Appeals affirmed on October 9, 2020. (ECF
2 No. 39-39). Remittitur issued on November 5, 2020. (ECF No. 39-40).

3 Riggs transmitted his original federal petition for writ of habeas corpus on
4 February 2, 2021, asserting 38 grounds for relief. (ECF No. 5). This Court granted
5 Riggs leave to file an amended petition by May 26, 2022. (ECF Nos. 20, 22, 25,
6 29). He timely filed the instant Petition on May 24, 2022. (ECF No. 28). Riggs's
7 Petition presents four grounds for relief:

- 8 1. The prosecutor denied him due process by withholding information
9 about other possible crimes during plea negotiations and thus
10 precluded his plea from being knowing, intelligent, and voluntary.
- 11 2. Trial counsel was ineffective for failing to tell him that Megan had a
12 medical condition affecting her brain and memory.
- 13 3. Trial counsel was ineffective for not telling him that Kayla made
14 inconsistent statements to investigators.
- 15 4. Trial counsel was ineffective for not telling him that videos of him
16 engaging in rough but consensual sex with a non-party were
17 inadmissible at trial.

18 Respondents moved to dismiss the Petition but later withdrew that motion.
19 (ECF No. 47). Respondents filed their answer to all grounds in the Petition on
20 August 14, 2023. (ECF No. 56). Riggs filed his reply on June 24, 2024. (ECF
21 No. 65).

22 **II. GOVERNING STANDARD OF REVIEW**

23 28 U.S.C. § 2254(d) sets forth the standard of review generally applicable
24 in habeas corpus cases under the Antiterrorism and Effective Death Penalty act
25 ("AEDPA"):

26 An application for a writ of habeas corpus on behalf of a person in
27 custody pursuant to the judgment of a State court shall not be
28 granted with respect to any claim that was adjudicated on the merits
in the State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

Under § 2254(d)(1)'s first clause, a state court decision is contrary to clearly established Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or if the state court decides a case differently than the Supreme Court on "a set of facts that are materially indistinguishable" from the Supreme Court's case. *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (cleaned up) (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000); citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). Under § 2254(d)(1)'s second clause, a state court decision is an unreasonable application of clearly established Supreme Court precedent "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 75 (cleaned up) (quoting *Williams*, 529 U.S. at 413).

And under § 2254(d)(2), "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). "Instead, § 2254(d)(2) requires that [federal habeas courts] accord the state trial court substantial deference." *Brumfield v. Cain*, 576 U.S. 305, 314 (2015). Thus, "[i]f reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's determination." *Id.* (cleaned up) (quoting *Wood*, 558 U.S. at 301); and *Rice v. Collins*, 546 U.S. 333, 341–342 (2006)). "This is a daunting standard—one that will be satisfied in relatively few cases." *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004), *abrogated on other grounds as stated in Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th Cir. 2014)).

But “the standard is not impossible to meet” *Id.* (citing *Miller-El v. Cockrell*, 537 U.S. 332, 340 (2003)). For it is met if “the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner’s claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable.” *Id.* at 1001 (citing *Wiggins v. Smith*, 539 U.S. 510, 526–30 (2003); and *Hall v. Director of Corr.*, 343 F.3d 976, 983 (9th Cir. 2003)).³

III. DISCUSSION

A. Ground 1—validity of nolo contendere pleas

In ground 1, Riggs alleges that his nolo contendere pleas were not knowingly, intelligently, or voluntarily entered because the State purposefully withheld evidence about uncharged crimes that a different state’s authorities were actively investigating. (ECF No. 28 at 7–10).

1. Background information

In exchange for Riggs’s nolo contendere plea to one count of attempted sexual assault in each case, the State agreed to drop any remaining charges and not to pursue charges in two matters that were being investigated by the Reno Police Department (Case Nos. 07-20350 and 08-33484) or any other case of sexual assault for which Riggs was subject to prosecution in Washoe County. (ECF No. 34-32). One day after Riggs pled in the first case, a grand jury in Jackson County, Oregon, returned an indictment charging him with one count of first-degree sodomy, one count of second-degree sexual abuse, two counts of promoting prostitution, and one count of compelling prostitution of his former

³ Riggs generally argues that the Court should review his claims de novo because AEDPA violates numerous parts of the U.S. Constitution. (ECF No. 28 at 7). The Court declines to reach this argument because Riggs provides no authorities or analysis save for admitting that the Ninth Circuit in *Crater v. Galaza*, 491 F.3d 1119 (9th Cir. 2007), rejected “some” of his “arguments.” (*Id.*)

1 girlfriend, Tephany H. (ECF No. 35-21). On September 12, 2013, Riggs moved for
2 discovery and sanctions in the Nevada cases, arguing the prosecutor withheld a
3 May 17, 2013, report prepared by Sparks Police Department (“SPD”) detectives
4 concerning their interview of Tephany H. until September 4, 2013, after Riggs
5 had pled in both Nevada cases. (ECF Nos. 34-33, 34-34). Riggs also moved to
6 withdraw his no-contest pleas based on the timing of that disclosure. (ECF
7 Nos. 34-37, 34-38).

8 In affidavits accompanying the motions to withdraw, Riggs testified:

9 I pleaded No Contest in this case and in case no. CR13-1364
10 concerning KAYLA H. based upon my understanding that all
11 materials and information concerning statements I had made
12 previously, as well as all information concerning my criminal record,
13 had been provided by the prosecutor. Had I known that all such
14 information had not been provided by the prosecutor, and especially
15 that concerning TEPHANY H. and the investigation by SPD Det.
16 Keating in Oregon discussed in this Motion, I would not have pleaded
17 No Contest pursuant to the plea negotiations with only the Nevada
18 prosecutor in this case, and would have instead gone to trial on the
19 original Nevada charges.

20 I pleaded no contest in this case and in case no. CR13-1334 [sic]
21 concerning KAYLA H. based upon my understanding that no other
22 criminal prosecutions were pending against me. Had I known about
23 the then-unfiled-yet-pending prosecution in Oregon concerning
24 TEPHANY H., I would not have pleaded No Contest pursuant to the
25 plea negotiations with only the Nevada prosecutor in this case, and
26 would have instead gone to trial on the original Nevada charges.

27 My intent in pleading No Contest in this case and in case no. CR13-
28 1364 concerning KAYLA H. was to achieve a global resolution of any
and all criminal prosecutions arising out of and related to the
criminal investigation begun and maintained by SPD Det. Keating
and his associates. Had I known that Det. Keating and his associates
had obtained incriminating information from TEPHANY H. and
provided it to an Oregon police detective, I would not have pleaded
No Contest pursuant to the plea negotiations with only the Nevada
prosecutor in this case, and would have instead gone to trial on the
original Nevada charges.

I prefer to fight the original Nevada charges now, rather than go to
Oregon having been convicted on my No Contest pleas and attempt
to confront the Oregon charges as a convicted felon and sex offender.
That would have been my preference prior to pleading No Contest.

(ECF No. 34-37 at 15–16).

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1 The State argued that SPD detectives became aware of Tephany when
2 executing a search warrant on Riggs’s phone. (ECF Nos. 34-35 at 3; 37-22 at 29).
3 Tephany told the detective that she had dated Riggs in Nevada, and he frightened
4 her “by pinning her in a ‘lock out’ position.” (*Id.*) But she gave Riggs a chance to
5 “prove himself to her” and he persuaded her to move with him to Oregon. (*Id.*)
6 While in Oregon, Riggs “sodomized her, [and] forced fellatio upon her that made
7 her gag and choke, like the sexual assaults he committed in Washoe County.”
8 (*Id.*) Riggs made her “work as a prostitute while [he] acted as her pimp, and [he]
9 placed ads on sites like Redbook, or Backpage.com.” (*Id.*) And Riggs arranged for
10 Tephany “to commit acts of prostitution, and take her to meet the johns, collect
11 the money, and drive [her] home from the ‘dates.’” (*Id.*) SPD detectives sent their
12 reports to law enforcement in Oregon, and Oregon authorities determined to seek
13 a grand jury indictment. (ECF No. 34-35).

14 The prosecutor sought to introduce prior-bad-act evidence two weeks
15 before Riggs pled in the first Nevada case (CR13-1067), but none of the proffered
16 evidence concerned the Oregon investigation or Tephany. (ECF No. 34-17). Trial
17 counsel argued that in a telephone conversation on September 4, 2013, after the
18 prosecutor disclosed the police report and information about the then-charged
19 Oregon crimes, the prosecutor justified the disclosure stating she “figured they’d
20 come in at sentencing anyway, so” (ECF No. 35-4 at 44). In response to
21 Riggs’s motions, the prosecutor argued she withheld the police report and
22 information about the Oregon investigation because disclosure “would have
23 seriously interfered with Oregon’s ability to indict” Riggs by prematurely
24 disclosing Oregon’s witness information and exposing them to potential harm.
25 (ECF No. 35-2 at 6–7). The prosecutor “was not aware that Oregon had finally
26 indicted the defendant until days later.” (ECF No. 35-6 at 6). And the Oregon
27 prosecutor did not tell the Nevada prosecutor about the return of the indictment;
28 rather, Nevada police “made that contact.” (*Id.* at 9).

1 The prosecutor also explained that she would not have sought to admit
 2 evidence about Riggs's prior bad acts against Tephany in the State's case in chief
 3 because those acts "were not 'date-rape' offenses, and Riggs's conduct of pimping
 4 out [Tephany], and furiously beating and raping her raised a danger of unfair
 5 prejudice which might not overcome such evidence's probative value." (ECF
 6 No. 34-35 at 7 (emphasis omitted)). The "evidence did not fit the State's theory of
 7 the case that [Riggs] is a date rapist who rapes his victims on the first date." (*Id.*)
 8 "This evidence is not favorable to the defense, it is not exculpatory, or even
 9 materially relevant to the crimes charged, and [Nevada] would not have disclosed
 10 the evidence if no indictment had been returned" in Oregon. (*Id.* at 8; *accord* ECF
 11 No. 55-9 at 37 (explaining that evidence about Riggs's acts involving Tephany
 12 "was more prejudicial than probative, because it is far more brutal, repeated,
 13 disgusting than anything that came out with any of the other one-time victims of
 14 the defendant")).

15 **2. State court determination**

16 In affirming Riggs's judgments of conviction, the Nevada Court of Appeals
 17 ("NCA") held:

18 *Prosecutorial misconduct*

19 Riggs claims that prosecutorial misconduct deprived him of due
 20 process under the state and federal constitutions. Riggs argues that
 21 the prosecutor intentionally withheld discovery of a Sparks Police
 22 Department report concerning uncharged misconduct committed in
 Oregon until after he had entered his nolo contendere pleas. And
 Riggs asserts that the prosecutor's discovery violation perverted the
 plea bargaining process.

23 We analyze claims of prosecutorial misconduct in two steps: first, we
 24 determine whether the prosecutor's conduct was improper, and
 25 second, if the conduct was improper, we determine whether it
 warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d
 465, 476 (2008). "[We] will not reverse a conviction based on
 prosecutorial misconduct if it was harmless error." *Id.*

26 Riggs presented this claim as a discovery violation in the court below
 27 and sought sanctions against the prosecutor. The district court
 28 found that the report in question related to an investigation being
 considered by a sitting grand jury in Oregon and that the State's
 disclosure of information concerning an ongoing investigation in

another jurisdiction would have been inappropriate and perhaps illegal. We note that the report was made available to Riggs shortly after he was indicted by the Oregon grand jury, and we conclude that Riggs has not demonstrated that the prosecutor's conduct was improper in this regard.

Motion to withdraw plea

Riggs claims that the district court erred by denying his motions to withdraw his nolo contendere pleas, which were based on claims of factual innocence. Riggs asserts that he would not have entered his nolo contendere pleas if he had known that he would be facing charges for similar criminal conduct in Oregon. And Riggs argues that he should have been allowed to withdraw his pleas because the prosecutor had intentionally withheld discovery of information critical to his plea decisions, his pleas were entered under a misconception of their consequences, and his motions to withdraw were made before the State suffered any prejudice.

A defendant may move to withdraw a plea before sentencing, NRS 176.165, and the district court may, in its discretion, grant such a motion "for any substantial, fair, and just reason." *Crawford v. State*, 117 Nev. 718, 721, 30 P.3d 1123, 1125 (2001). "The question of a [defendant's] guilt or innocence is generally not at issue in a motion to withdraw a guilty plea." *Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 224 (1984). "On appeal from a district court's denial of a motion to withdraw a guilty plea, [we] will presume that the lower court correctly assessed the validity of the plea, and we will not reverse the lower court's determination absent a clear showing of an abuse of discretion." *Riker v. State*, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995) (internal quotation marks omitted).

The district court heard argument on Riggs' motions and found, among other things, that Riggs was not entitled to discovery about the Oregon matter and his preference for proceeding to trial on the original Nevada charges rather than face the Oregon charges after having been convicted on his nolo contendere pleas was not a substantial reason for withdrawing the pleas. We conclude Riggs has not demonstrated that the district court abused its discretion in this regard.

[FN1] To the extent that Riggs asks this court to modify the law regarding presentence motions to withdraw guilty pleas, we note that the Nevada Supreme Court's decisions are binding on this court and we decline to do so.

(ECF No. 37-35 at 5-7).

3. Relevant law

"The longstanding test for determining the validity of a guilty [or nolo contendere] plea is 'whether the plea represents a voluntary and intelligent choice

1 among the alternative courses of action open to the defendant.” *Hill v. Lockhart*,
 2 474 U.S. 52, 56 (1985) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970);
 3 citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), and *Machibroda v. United*
 4 *States*, 368 U.S. 487, 493 (1962)). The voluntariness of a plea “can be determined
 5 only by considering all of the relevant circumstances surrounding it.” *Brady v.*
 6 *United States*, 397 U.S. 742, 749 (1970) (cleaned up). “A plea of guilty entered by
 7 one fully aware of the direct consequences . . . must stand unless induced by
 8 threats . . . , misrepresentation (including unfulfilled or unfulfillable promises),
 9 or perhaps by promises that are by their nature improper as having no proper
 10 relationship to the prosecutor’s business (e.g. bribes).” *Id.* at 755 (quoting with
 11 approval *Shelton v. United States*, 242 F.2d 101, 115 (5th Cir. 1957) (Tuttle, J.,
 12 dissenting)).

13 The Supreme Court “has recognized that prosecutorial misconduct may ‘so
 14 infect the trial with unfairness as to make the resulting conviction a denial of due
 15 process.’” *Greer v. Miller*, 483 U.S. 756, 765 (1987) (cleaned up) (quoting *Donnelly*
 16 *v. DeChristoforo*, 416 U.S. 637, 643 (1974)). “[D]ue process considerations include
 17 not only (1) the nature of the private interest at stake, but also (2) the value of
 18 the additional safeguard, and (3) the adverse impact of the requirement upon the
 19 Government’s interests.” *United States v. Ruiz*, 536 U.S. 622, 631 (2002) (citing
 20 *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985)).

21 **4. Analysis**

22 As noted above, NCA determined that the prosecutor did not engage in
 23 misconduct by withholding SPD’s May 17, 2013, report during plea negotiations
 24 in the Nevada cases. In so holding, NCA found that the report was related to an
 25 investigation by a seated grand jury in Oregon, and it expressed concern that it
 26 would have been improper and perhaps illegal for the prosecutor to reveal
 27 information related to an ongoing grand jury investigation. Riggs argues this
 28 determination is objectively unreasonable under 2254(d)(2) because the

1 prosecutor could have disclosed the police report without revealing the existence
2 of the Oregon grand jury's proceedings. (ECF No. 65 at 13–14).

3 The police report is not part of the record in this proceeding.⁴ This Court's
4 review is limited to the record that was before the NCA. *See Cullen v. Pinholster*,
5 563 U.S. 170, 181 (2011). However, that record reflects the Nevada detectives
6 interviewed Riggs's former girlfriend Tephany in Oregon, and the report contains
7 her statements about repeated acts of violence, sexual abuse, and forced
8 prostitution that Riggs committed against her while they were in a relationship
9 and living together in Oregon.

10 Nevada detectives turned their report over to Oregon's authorities who
11 determined to investigate further. The Oregon investigation was handled by a
12 different sovereign state's agents over whom the Nevada prosecutor had no
13 authority or direct contact, and it was put before a seated grand jury in Oregon.
14 Around this time, the prosecutor sought to introduce prior-bad-act evidence in
15 Nevada's first case-in-chief against Riggs, but none of the proffered evidence
16 concerned Tephany, i.e., the video of Riggs and Tephany engaging in rough but
17 consensual sex or Tephany's statements about Riggs's uncharged Oregon crimes.

18 Indeed, the Nevada prosecutor argued that the uncharged Oregon crimes
19 were inconsistent with the State's theory that Riggs raped his victims on the first
20 date, the Oregon evidence likely was more prejudicial than probative and thus
21 inadmissible to prove any element of the Nevada crimes, and disclosing
22 information about the uncharged Oregon crimes could interfere with Oregon's
23 active grand jury investigation and expose Oregon's witnesses to harm. Relatedly,
24

25 ⁴ Redacted and unredacted copies of the report were admitted into evidence as
26 Exhibits 4 (redacted) and 5 (unredacted) during the trial court's September 27,
27 2013, hearing. (ECF No. 34-30 at 14 (erroneously referring to "May 7, 2013" SPD
28 report).) But those reports do not appear to have been part of the record in Riggs's
direct appeals. (*See, e.g.*, ECF Nos. 36-43 (joint appendix in appeal 64778), 37-6
(errata to joint appendix in appeal 64778), 37-7 (errata to joint appendix in appeal
64780), 37-16 (notice correcting joint appendix in appeal 64780)).

1 Megan testified before the Nevada grand jury that Riggs continued to contact her
2 after she told him to stop and told him that she'd reported his acts to police, and
3 that he ceased contact only after she obtained a restraining order.

4 NCA correctly considered the totality of circumstances in adjudicating
5 Riggs's interrelated prosecutorial-misconduct and involuntary-plea claims. *See*
6 *Brady*, 397 U.S. at 749. NCA reasonably found that premature disclosure of
7 information related to the pending Oregon investigation would have been
8 improper. The record supports the reasonable inference that the uncharged
9 Oregon crimes were separate and distinct criminal acts from the first-date-rape
10 crimes being prosecuted in the Nevada cases. The record also supports the
11 reasonable inference that disclosure could undermine Nevada's and Oregon's
12 separate interest in securing "those guilty pleas that are factually justified,
13 desired by defendants, and help to secure the efficient administration of justice."
14 *See Ruiz*, 536 U.S. at 631–32 (reiterating that due process considerations include
15 "the adverse impact of the requirement upon the Government's interests").
16 Premature disclosure of that information could disrupt Oregon's ongoing
17 investigation and subject its witnesses to harassment and serious harm, which
18 the Supreme Court has held are "valid" concerns. *See id.* And "[i]t could require
19 [Nevada] to devote substantially more resources to trial preparation prior to plea
20 bargaining, thereby depriving the plea-bargaining process of its main resource-
21 saving advantages." *See id.* at 632.

22 NCA's determinations that (1) the prosecutor's withholding SPD's police
23 report concerning uncharged crimes being investigated by a seated grand jury in
24 Oregon during negotiation of separate crimes in Nevada was not improper and
25 (2) Riggs was not entitled to pre-plea discovery of SPD's police report are not
26 based on an unreasonable determination of the facts. Accordingly, the Court
27 declines to review those decisions de novo and instead applies deferential review
28 as required.

1 The NCA decisions are not contrary to, or an unreasonable application of,
2 clearly established federal law. *See Brady*, 397 U.S. at 749 & 755 (holding that
3 validity of a plea is based on the totality of the circumstances); *cf. Ruiz*, 536 U.S.
4 at 630–31 (collecting cases and reiterating that the Constitution does not require
5 a defendant’s “complete knowledge of the relevant circumstances, but permits a
6 court to accept a guilty plea, with its accompanying waiver of constitutional
7 rights, despite various forms of misapprehension under which a defendant might
8 labor”). Riggs argues that the State’s failure to disclose its report about uncharged
9 crimes in Oregon deprived him of essential information and rendered his plea
10 invalid. Riggs acknowledges that this case does not concern the prosecution’s
11 duty to disclose exculpatory evidence. Rather, Riggs argues that courts have
12 acknowledged that withholding inculpatory evidence could result in a due
13 process violation in the context of a trial and that the same reasoning should
14 apply in the plea context.

15 Yet none of the cases cited by Riggs support a due process violation here,
16 where the withheld evidence involved separate, uncharged conduct. *See Coleman*
17 *v. Calderon*, 210 F.3d 1047, 1052 (9th Cir. 2000) (finding no due process violation
18 based on state’s pretrial concealment of inculpatory evidence related to charged
19 crimes); *Lindsay v. Smith*, 820 F.2d 1137, 1151 (11th Cir. 1987) (same); *Wooten*
20 *v. Thaler*, 598 F.3d 215, 220 (5th Cir. 2010) (same). Relatedly, the Ninth Circuit
21 has held that a prosecutor’s failure to disclose an investigation of independent,
22 uncharged crimes during plea negotiations did not violate due process. *United*
23 *States v. Krasn*, 614 F.2d 1229, 1234 (9th Cir. 1980) (finding the defendant’s
24 “gratuities charges and the antitrust charge involved independent criminal
25 transactions” and the antitrust investigation was at a preliminary stage during
26 plea negotiations); *United States v. Clark*, 218 F.3d 1092, 1097 (9th Cir. 2000)
27 (finding the defendant’s pawn-shop burglary and postal robberies “involved
28 independent criminal transactions”; the government did not file an indictment

about the burglary until over a year after the plea agreement; and “the prosecutor’s reasons for not disclosing the future charges do not suggest foul play”). Accordingly, Riggs is not entitled to habeas relief for ground 1.

B. Ground 2—Trial counsel ineffectiveness

In ground 2, Riggs alleges that his trial counsel was ineffective for withholding three pieces of information during plea negotiations: (1) Megan had a brain condition affecting her memory; (2) Kayla made inconsistent statements to investigators; and (3) video of Riggs engaging in rough but consensual sex with Tephany was inadmissible at trial.

1. State court determination applicable to each subground

In affirming the state court’s denial of Riggs’s post-conviction petitions, NCA held:

Riggs claims the district court erred by denying his petitions because defense counsel was ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate (1) counsel’s performance was deficient in that it fell below an objective standard of reasonableness and (2) a reasonable probability, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

The petitioner must show both components of the ineffective-assistance inquiry—deficiency and prejudice, *Strickland v. Washington*, 466 U.S. 668, 697 (1984), and the petitioner must demonstrate the underlying facts of his claim by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We review the district court’s resolution of ineffective-assistance claims de novo, giving deference to the court’s factual findings if they are supported by substantial evidence and not clearly wrong. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

* * *

Riggs also claims the district court erred by finding that his testimony was not credible. “[T]he district court is in the best position to adjudge the credibility of the witnesses and the evidence, and unless this court is left with the definite and firm conviction that a mistake has been committed, this court will not second-guess the trier of fact.” *Rincon v. State*, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) (internal quotation marks omitted). We have reviewed the evidentiary hearing transcript, and we are not convinced that the district court made a mistake.

(ECF No. 39-39 at 2–3, 5).

2. Relevant law

In *Strickland v. Washington*, the Supreme Court propounded a two-prong test for analyzing ineffective-assistance-of-counsel claims that requires the petitioner to demonstrate (1) the attorney’s “representation fell below an objective standard of reasonableness” “under prevailing professional norms” and (2) the attorney’s deficient performance prejudiced the defendant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. 668, 688 & 694 (1984). “Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.” *Id.* at 700. “[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Id.* at 696.

A federal habeas court’s “scrutiny of counsel’s performance must be highly deferential.” *Id.* at 689. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Id.* Under the prejudice prong, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

“The standards created by *Strickland* and [AEDPA] are both highly deferential, and when the two apply in tandem, review is ‘doubly’ so” *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (cleaned up). Thus, “[w]hen [AEDPA] applies, the question is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Id.*

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1 **3. Ground 2(a)—Megan’s brain condition**

2 In ground 2(a), Riggs alleges that his trial counsel was ineffective for failing
3 to tell him before he pled nolo contendere that Megan had a brain condition that
4 might have affected her memory of the events. (ECF No. 28 at 12).

5 **a. State court determination**

6 In affirming the state court’s denial of Riggs’s post-conviction petitions,
7 NCA held:

8 First, Riggs claimed in his petition that defense counsel was
9 ineffective for failing to inform him that victim Megan had a brain
10 injury that may have compromised her ability to testify about the
11 charges. The district court held an evidentiary hearing and made the
12 following findings. Defense counsel could not testify at the
13 evidentiary hearing because he is deceased. Riggs did not testify
14 truthfully when he said that counsel failed to inform him of Megan’s
15 possible injuries. He did not prove that counsel’s performance was
deficient or that he was prejudiced. And he did not demonstrate that
Megan’s trial testimony would have been unreliable to the extent that
he would have insisted on going to trial. We conclude the district
court’s findings are supported by the record and are not clearly
wrong, Riggs failed to meet his burden to demonstrate that counsel
was ineffective, and the district court did not err by rejecting this
claim.

16 (ECF No. 39-39 at 3).

17 **b. Analysis**

18 **i. 28 U.S.C. § 2254(d)(2)**

19 Riggs contends that NCA’s adjudication of his ineffective-assistance claim
20 about Megan’s brain condition is not entitled to deference because it was based
21 on an unreasonable determination of the facts. Specifically, Riggs argues that the
22 state district court implied during the evidentiary hearing that it would not
23 question trial counsel’s actions retrospectively because he died in the interim.
24 (ECF No. 65 at 21–22). Second, the state court “doubted Riggs’s credibility simply
25 because [trial counsel] was known to be a formidable defense attorney.” (*Id.* at
26 22). Finally, the state court unreasonably found that Riggs’s affidavit attached to
27 the motions to withdraw his pleas undermined his claim. (*Id.* at 22–23). The Court
28 rejects this challenge.

1 Although the state court found it “very marginally relevant at best” given
2 earlier litigation on the issue, it allowed Riggs to develop his theory that his pleas
3 were involuntary in part because trial counsel refused to provide him discovery
4 while he was in the jail’s general population due to the sexual nature of his
5 charges. (ECF No. 55-17 at 10–12). Riggs opined that failing to give him discovery
6 to review was not routine, although he assumed it was at the time. (*Id.* at 12–13).
7 The state court overruled the State’s objection explaining, “I’m going to allow
8 some of this to happen, [counsel]. I hear your objection. I’ll give you latitude on
9 cross examination to develop the speculative nature of his supposition about
10 what is or isn’t routine.” (*Id.* at 13).

11 Additionally, the state court’s comments about the sometimes overly
12 zealous nature of trial counsel’s advocacy show that, contrary to Riggs’s claim, it
13 was not biased in favor of trial counsel:

14 It is no understatement to say that these files are replete with
15 zealous, vigorous, at times unnecessarily sharp-edged advocacy.
16 What do I mean? There were personal attacks against [the
17 prosecutor] in these cases. Those personal attacks were over the top.
18 In my view, given the evidence as I understand it, unnecessary, but
19 nonetheless they were made. And they were made in defense of Mr.
20 Riggs. That’s but one of the innumerable examples of the way in
21 which [trial counsel] sought to defend Mr. Riggs vigorously.

22 (*Id.* at 142). Relatedly, the state court did not doubt Riggs’s credibility based solely
23 on the strength of trial counsel’s reputation. Rather, the state court detailed
24 several reasons why it found that Riggs was not being truthful.

25 First, the state court stated that Riggs was negatively affecting his
26 credibility by opining “about the statute of limitations issue related to his
27 potential civil rights claim while at the same time denying his understanding of
28 the meaning of the word sexual assault.” (*Id.* at 46; *accord id.* at 143–44). This
was a reasonable determination. Riggs wrote letters to the state court claiming
that court deputies “sexually assaulted” him while the trial court was in recess
during sentencing. (ECF Nos. 38-34, 38-35). And in ground 28 of Riggs’s proper

1 person state post-conviction petition, he argued that trial counsel was an
2 accessory before the fact and the trial court was an accessory after the fact to his
3 “sexual assault” and “rape” by the deputies. (ECF No. 37-50 at 48).

4 But Riggs testified at the evidentiary hearing that the deputies “didn’t make
5 physical contact” and “[t]here was no sexual penetration.” (ECF No. 55-17 at 32).
6 Rather, the deputies “didn’t tell [Riggs] he was being strip searched. They just
7 instructed [him] to remove articles of clothing one at a time.” (*Id.*) One of the
8 deputies “had his hand on the gun at the time” and said, “any noncompliance
9 would be considered resistance.” (*Id.*)

10 The state court interrupted Riggs asking to confirm he’d testified that
11 nobody sexually assaulted him. (*Id.* at 33). Riggs quibbled, stating his testimony
12 was that nobody “penetrated” him but what happened is “assault by definition.”
13 (*Id.*) He later equivocated, calling it “the strip search assault.” (*Id.* at 35). Yet even
14 later Riggs testified he understood that sexual assault is the “[u]nlawful sexual
15 penetration” of another. (*Id.* at 64). And he did so after testifying that he nearly
16 obtained a degree in journalism, won awards for journalism, and acknowledged
17 “[t]o the best of [his] ability, which [he] would say is above average, yes, [he’s]
18 absolutely careful” in his writing. (*Id.* at 40–42).

19 Second, the state court found that Riggs falsely testified that he did not
20 have access to his criminal case file. (*Id.* at 142). This was a reasonable
21 determination. Riggs testified, “I don’t have the entirety of my file.” (*Id.* at 53). And
22 Riggs argued in motion practice during his state post-conviction proceeding that
23 he “never had, does not have, and cannot conceive how he ever will, from prison,
24 [have] access to his case file materials.” (ECF No. 38-18 at 3). Yet as the state
25 court correctly recounted, (ECF No. 55-17 at 142–43), earlier Riggs had filed
26 proper person notices about the disposition of his case file after trial counsel
27 withdrew stating, he “received—but did not open—two boxes, each weighing
28 about fifty (50) pounds on July 7, 2015.” (ECF Nos. 37-48 at 3; 37-49 at 3).

1 Unable to retain the boxes in prison, Riggs stated that he sent them to his father
2 who arranged for them to be received and held by Puliz, a document storage
3 company. (ECF No. 37-48 at 4). Riggs stated he also arranged for a third box to
4 be collected and retain by Puliz. (*Id.* at 6–7). Riggs signed these notices “under
5 penalty of perjury.” (ECF Nos. 37-38 at 14; 37-39 at 14).

6 Third, the state court concluded that the record was replete with
7 circumstantial evidence demonstrating that trial counsel “at all junctures shared
8 all critical information with [Riggs].” This was a reasonable determination. As the
9 state court correctly recounted, (ECF No. 55-17 at 27–28), Riggs submitted an
10 affidavit in support of the motions to withdraw his pleas stating that he’d read
11 the motions and detailing that he would not have pled nolo contendere but would
12 have gone to trial had the State informed him about the uncharged Oregon
13 crimes. (ECF Nos. 34-37 at 15–17; 34-38 at 15–17). The state court found it was
14 “clear that [Riggs] was communicating in detail with [trial counsel] about various
15 issues in his case and reading documents and signing affidavits.” (ECF No. 55-
16 17). This was a reasonable determination.

17 Indeed, Riggs was “present in Court” during the in-camera hearing on his
18 motion to retain “expert witnesses at public expense” in which trial counsel
19 successfully argued that Riggs needed to retain a “forensic mental health expert”
20 to consult with about medical issues including “the medical claims by the
21 accuser, [Megan], about --- I mean, this young lady has significant issues, all of
22 which it seems were brought out at the Grand Jury to explain her conduct.” (ECF
23 No. 55-4 at 4, 12–13, 16). Trial counsel stated the defense would be “moving to
24 exclude some of these things.” (*Id.* at 13). Trial counsel also stated the defense
25 would be moving for an order requiring Megan “to produce her medical
26 records” (*Id.* at 14).

27 The record shows that trial counsel had a pattern of filing detailed and
28 thorough briefs before Riggs pled nolo contendere in either case. (*See e.g.*, ECF

1 Nos. 34-5, 34-8 (successful motion to dismiss the battery charge on statute-of-
2 limitations grounds); ECF Nos. 34-9, 34-13 (response to the State’s motion for an
3 order compelling the Reno Police Department to disclose all police reports in
4 which Riggs is the accused suspect for or pertaining to his sexual acts); ECF
5 No. 34-15 (motion to exclude other-acts/character/propensity evidence,
6 specifically videos and photographs of a sexual nature that were seized from
7 Riggs’s cellphone and evidence about Kayla in the case about Megan and vice
8 versa); ECF No. 34-18 (motion to compel production of Megan’s health records,
9 permit independent medical and mental-health examinations, and exclude
10 evidence and testimony about her health from trial); and ECF No. 34-25 (reply
11 supporting Riggs’s evidentiary motion about Megan’s health)). Relatedly, in the
12 same hearing as Riggs’s plea canvas in the first case, trial counsel argued that
13 Riggs’s motion “requesting information and materials concerning [Megan’s]
14 medical and mental health condition . . . remain pending” and would require a
15 hearing. (ECF No. 55-6). Thus, trial counsel twice discussed Megan’s mental
16 health as a defense argument in open court in front of Riggs. Yet Riggs did not
17 raise this as an issue until two and a half years later when he filed his proper
18 person post-conviction petition. (*See* ECF No. 37-50).

19 Additionally, Riggs testified that he and trial counsel discussed the “pros
20 and cons” of the case. (ECF No. 55-17 at 72). Riggs testified that he met with trial
21 counsel twice while he was detained after the arrest for the first case, they met
22 three times in trial counsel’s office after Riggs was released, and they met six
23 more times in jail after Riggs was arrested for the second case. (*Id.* at 59–61).
24 Generally, their meetings lasted 45 minutes to an hour. (*Id.* at 61–62).

25 Finally, the state court determined that “[t]he evidence of [Riggs] guilt is
26 overwhelming and it’s most evident in his frank denials of obvious truths,
27 misremembering, misdescribing or not describing things which he in his own
28 words has described at different times. I do not believe him when he says -- I sat

1 mere feet from him during his testimony, saw his demeanor, observed language,
 2 observed his responses to my questions and I do not believe him when he says
 3 [trial counsel] did not share details of information.” (*Id.* at 147).

4 This Court finds that the NCA’s rejection of Riggs’s ineffective-assistance
 5 claim alleging that trial counsel withheld information about Megan’s brain
 6 condition until after he pled nolo contendere was not based on an unreasonable
 7 determination of the facts in light of the evidence before it.

8 **ii. 28 U.S.C. § 2254(d)(1)**

9 Riggs next contends that the NCA’s adjudication of his ineffective-
 10 assistance claim about Megan’s brain condition was an unreasonable application
 11 of *Strickland* and *Hill* because the state court determined that Riggs needed to
 12 prove what Megan’s injuries were and how they might impact her ability to testify
 13 to show prejudice. (ECF No. 65 at 23–24). The Court rejects this challenge.

14 When a petitioner alleges that trial counsel’s deficient performance led him
 15 to accept a guilty plea rather than go to trial, courts “consider whether the
 16 defendant was prejudiced by the ‘denial of the entire judicial proceeding to which
 17 he had a right.’” *Lee v. United States*, 582 U.S. 357, 364 (2017) (cleaned up)
 18 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000)). This requires the
 19 petitioner to “show that there is a reasonable probability that, but for counsel’s
 20 errors, he would not have pleaded guilty and would have insisted on going to
 21 trial.” *Hill*, 474 U.S. at 59. A reasonable probability is a probability sufficient to
 22 undermine confidence in the outcome.” *Harrington*, 562 U.S. at 104 (quoting
 23 *Strickland*, 466 U.S. at 694). “It is not enough ‘to show that the errors had some
 24 conceivable effect on the outcome of the proceeding.’” *Id.* (quoting *Strickland*, 466
 25 U.S. at 693).

26 “Courts should not upset a plea solely because of *post hoc* assertions from
 27 a defendant about how he would have pleaded but for his attorney’s deficiencies.
 28 Judges should instead look to contemporaneous evidence to substantiate a

1 defendant's expressed preferences." *Lee*, 582 U.S. at 369. "Moreover, to obtain
2 relief on this type of claim, a petitioner must convince the court that a decision
3 to reject the plea bargain would have been rational under the circumstances."
4 *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (citing *Roe*, 528 U.S. at 486).

5 "The *Strickland* standard is a general one, so the range of reasonable
6 applications is substantial." *Harrington*, 562 U.S. at 105 (cleaned up). Thus, "[t]he
7 pivotal question is whether the state court's application of the *Strickland* standard
8 was unreasonable." *Id.* at 101. Put differently, "[u]nder § 2254(d), a habeas court
9 must determine what arguments or theories supported . . . the state court's
10 decision; and then it must ask whether it is possible fairminded jurists could
11 disagree that those arguments or theories are inconsistent with the holding in a
12 prior decision of" the Supreme Court. *Id.* at 102.

13 This Court must defer to the NCA's determination that Riggs did not testify
14 truthfully about trial counsel withholding this information before he pled nolo
15 contendere. *See Davis v. Ayala*, 576 U.S. 257, 273–74 (2015) (reiterating that
16 credibility and demeanor determinations "lie peculiarly within a trial judge's
17 province" and reviewing federal habeas courts will defer to the trial court except
18 in "exceptional circumstances"). NCA reasonably could have inferred that Riggs
19 also was not truthful when he testified that he would not have pled in either case
20 but for trial counsel's withholding that information. Arguments that Riggs's
21 testimony was not credible support the NCA's determination that he had not
22 shown prejudice for this claim.

23 Riggs's motion to exclude evidence and testimony about Megan's medical
24 conditions was filed contemporaneously with plea negotiations. (ECF No. 34-18).
25 The contents of this motion support the conclusion that rejecting the plea bargain
26 based solely on knowledge that Megan has a brain condition—without more—
27 would not have been rational under the circumstances. As trial counsel argued,
28 "[t]he subject matter is, obviously, beyond the knowledge of a lay person." (*Id.* at

1 7). “The evidence of Megan’s medical and mental health problems also carries a
2 great risk of engendering sympathy for Megan, sympathy which substantially
3 outweighs any probative value of the evidence.” (*Id.* at 8). This is precisely why
4 trial counsel sought and obtained a forensic mental health expert for Riggs at
5 public expense to consult with before trial about medical issues like Megan’s
6 brain condition. (ECF No. 55-4).

7 The record shows that at the time of plea negotiations, the State continued
8 to theorize that Riggs possibly could be culpable of sexually assaulting Megan
9 because of her brain condition. As the information supplementing the indictment
10 provides, Riggs either “willfully and unlawfully” subjected Megan to sexual
11 penetration of her vagina and mouth “against [her] will, or under conditions in
12 which [Riggs] knew or should have known that [Megan] was mentally or physically
13 incapable of resisting [his] conduct” (ECF No. 34-24 at 2, 3). NCA reasonably
14 could have inferred that at the time Riggs pled, rejecting the plea bargain based
15 on the limited information known about Megan’s brain condition would not have
16 been rational.

17 This Court finds that the NCA’s rejection of Riggs’s ineffective-assistance
18 claim alleging that trial counsel withheld information about Megan’s brain
19 condition until after he pled nolo contendere was not contrary to, nor an
20 unreasonable application of, clearly established federal law, nor was it based on
21 an unreasonable determination of the facts. Accordingly, Riggs is not entitled to
22 habeas relief for ground 2(a).

23 **4. Ground 2(b)—Kayla’s inconsistent statements**

24 In ground 2(b), Riggs alleges that his trial counsel was ineffective for failing
25 to tell him before he pled nolo contendere that Kayla made inconsistent
26 statements to investigators. (ECF No. 28 at 12–13).

27 //

28 //

a. Background information

SPD detectives reported that when they interviewed Kayla on the morning of the event, she “was having a difficult time explaining what had occurred.” (ECF No. 39-4 at 5). Kayla initially told the detective that “she hadn’t been raped.” (*Id.* at 6). But when the detective asked why Kayla’s male friend would call and report that she told him Riggs raped her if that wasn’t true, Kayla clarified that Riggs “made her do things that she didn’t want to do.” (*Id.*) Specifically, Kayla told the detective that Riggs had “forced her mouth open and stuck his penis in her mouth” and also stuck his penis in her anus against her will. (*Id.*)

b. State court determination

In affirming the state court’s denial of Riggs’s post-conviction petitions, NCA held:

Second, Riggs claimed in his petition that defense counsel was ineffective for failing to inform him that victim Kayla initially told the police he did not rape her. The district court made the following findings. Riggs’ testimony that counsel did not tell him about Kayla’s statement was incredible. Riggs acknowledged he met with counsel a dozen or so times, each meeting lasted an hour or longer, and they discussed the strengths and the weaknesses of the State’s case at these meetings. Riggs’ father testified that counsel and Riggs talked about Kayla’s exculpatory statement. Riggs knew the exculpatory nature of Kayla’s initial statement would have been offset at trial by her explanation of what subsequently occurred. Kayla stated there was some consensual sexual activity between her and Riggs at first, but then Riggs “brutally raped her anally and forced her to orally copulate him.” It is unbelievable that Riggs did not know about this statement, that counsel did not tell Riggs about this statement, and that Riggs would have proceeded to trial if he had known about this statement. We conclude the district court’s findings are supported by the record and are not clearly wrong, Riggs failed to meet his burden to demonstrate that counsel was ineffective, and the district court did not err by rejecting this claim.

(ECF No. 39-39 at 4).

c. Analysis

Riggs argues that the NCA’s adjudication of his ineffective-assistance claim about Kayla’s inconsistent statements is not entitled to deference because it was based on an unreasonable determination of the facts. Specifically, Riggs argues

1 that NCA misapprehended that his father Peter Riggs's testimony contradicted
2 his testimony when Peter's testimony was equivocal at best. (ECF No. 65 at 24).
3 This Court disagrees.

4 Peter testified that he suffered a stroke in August 2016 and suffers from
5 "aphasia and lability," which make it difficult for him to answer questions. (ECF
6 No. 55-17 at 102–03). Peter did not testify that his memory was affected. (*Id.* at
7 102–08). And Peter recalled Riggs's first arrest in March 2013, Riggs's release in
8 April 2013, and attending meetings between Riggs and trial counsel after that
9 release. (*Id.* at 103–04).

10 When asked if he recalled trial counsel telling Riggs "that one of the victims
11 had told the police that she had not been raped" Peter testified, "Yes. I believe
12 so." (*Id.* at 107). Peter brought up his intervening stroke, but the prosecutor
13 interrupted, asking if Peter recalled trial counsel telling Riggs "that one of the
14 victims had a brain injury." (*Id.*) Peter responded, "Yes. He also had in the court."
15 (*Id.*) This testimony was provided in the wider context of conversations that Peter
16 testified he'd overheard between Riggs and trial counsel when he attended their
17 meetings in which "pros and cons of the charges against" Riggs were discussed.
18 (*Id.* at 106). NCA reasonably determined that Peter's testimony undermined
19 Riggs's credibility and claim that trial counsel withheld information about Kayla's
20 inconsistent statements from him.

21 Additionally, as the Court explained in its analysis of ground 2(a), there is
22 ample evidence supporting the state court's determination that Riggs did not
23 testify truthfully that trial counsel withheld Megan's brain condition from him
24 before he pled. This Court must defer to the state court's credibility
25 determinations. Arguments that Riggs's testimony was not credible support the
26 NCA's determination that he had not shown prejudice for this claim.

27 Moreover, Riggs testified at the evidentiary hearing that trial counsel taught
28 him "there were internal contradictions" regarding Kayla's allegations. (ECF

No. 55-17 at 48). But “internal contradictions” about Kayla’s allegations wouldn’t matter after Riggs pled no contest to attempted sexual assault. Relatedly, Riggs testified during the evidentiary hearing that the question of when sex becomes nonconsensual for legal purposes was one of his “big questions to [trial counsel]” who “actually explained to [Riggs] this in detail, that there’s a common law” about that issue. (*Id.* at 80). When Riggs couldn’t recall if Kayla told him the sex was no longer consensual, the trial court quoted the following from Riggs’s statement that was attached to the presentence investigation report:

It says on February 23–24, 2023, Kayla . . . invited me to her house for a date. We had consensual vaginal and oral sex to completion during which I put my fingers in her anus with no objection from Kayla. Two hours later, during consensual vaginal sex from behind, I put my fingers in her anus. She did not object. I then placed my penis in her anus, she objected and I withdrew within seconds, but not as quickly as I could. I thought all of our sex was consensual. Later, Kayla claimed it was otherwise.

(*Id.* at 79–81).

The NCA’s conclusion that Riggs did not testify truthfully that trial counsel failed to inform him about Kayla’s inconsistent statements before he pled nolo contendere is not objectively unreasonable. This Court finds that the NCA’s rejection of Riggs’s ineffective-assistance claim alleging that trial counsel withheld information about Kayla’s inconsistent statements until after he pled nolo contendere was not contrary to, nor an unreasonable application of, clearly established federal law, and it was not based on an unreasonable determination of the facts. Accordingly, Riggs is not entitled to habeas relief for ground 2(b).

5. Ground 2(c)—inadmissibility of video

In ground 2(c), Riggs alleges that his trial counsel was ineffective for failing to tell him before he pled nolo contendere that video of him engaging in rough but consensual sex with Tephany was inadmissible at trial in the Nevada cases. (ECF No. 28 at 13–14).

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1 **a. State court determination**

2 In affirming the state court's denial of Riggs's post-conviction petitions,
3 NCA held:

4 Third, Riggs claimed in his petition that defense counsel was
5 ineffective for failing to inform him that a certain video could not be
6 used against him at trial. The district court made the following
7 findings. Counsel did not tell Riggs that the video would be
8 admissible, the video allegedly depicted lawful activity, and the video
9 would not have been relevant evidence at Riggs' trial. These findings
 are supported by the record and are not clearly wrong. We conclude
 that Riggs failed to demonstrate that counsel misadvised him about
 the admissibility of the video, Riggs has not shown that he was
 prejudiced by counsel's performance in this regard, and the district
 court did not err by rejecting this claim.

10 (ECF No. 39-39 at 4–5).

11 **b. Analysis**

12 Riggs argues that the NCA's adjudication of his ineffective-assistance claim
13 about the video evidence is not entitled to deference because it was based on an
14 unreasonable determination of the facts. Specifically, Riggs argues there was no
15 testimony contradicting his claim that trial counsel told him the video could be
16 used against him, and it's possible that trial counsel stated this because he
17 believed the state would argue to admit the video along with evidence about the
18 uncharged Oregon crimes. (ECF No. 65 at 24–25).

19 Again, there was ample evidence supporting the state court's determination
20 that Riggs did not testify truthfully that trial counsel withheld other critical
21 information from him before he pled. This Court must defer to the state court's
22 credibility determinations. Arguments that Riggs's testimony was not credible
23 support the NCA's determination that he had not shown prejudice for this claim.

24 Additionally, about two weeks before the first plea was entered, trial
25 counsel moved to exclude the video of Riggs and Tephany that SPD obtained from
26 his cellphone, arguing the video "would be substantially more prejudicial than
27 probative" as it did not involve either Megan or Kayla and the acts were
28 consensual but embarrassing for Riggs. (ECF No. 34-15). This was filed on the

1 heels of the State’s motion to introduce prior bad act evidence. (ECF No. 34-17).
2 Notably, the State’s motion did not seek to introduce the video. (*Id.*) Thus, the
3 record does not support the inference that trial counsel possibly believed that the
4 video would be admissible at trial.

5 The NCA’s conclusion that Riggs did not testify truthfully that trial counsel
6 misinformed him that the video was admissible in the Nevada cases is not
7 objectively unreasonable. This Court finds that the NCA’s rejection of Riggs’s
8 ineffective-assistance claim alleging that trial counsel misinformed him about the
9 admissibility of video evidence until after he pled nolo contendere was not
10 contrary to, nor an unreasonable application of, clearly established federal law,
11 and it was not based on an unreasonable determination of the facts. Accordingly,
12 Riggs is not entitled to habeas relief for ground 2(c).

13 **IV. CERTIFICATE OF APPEALABILITY**

14 Rule 11 of the Rules Governing Section 2254 Cases requires this Court to
15 issue or deny a certificate of appealability (“COA”). This Court has evaluated the
16 claims within the Petition for suitability for the issuance of a COA. Under 28
17 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner has made “a
18 substantial showing of the denial of a constitutional right.” With respect to claims
19 rejected on the merits, a petitioner “must demonstrate that reasonable jurists
20 would find the district court’s assessment of the constitutional claims debatable
21 or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Applying this standard,
22 this Court finds that a COA is unwarranted.

23 **V. CONCLUSION**

24 It is therefore ordered that the First Amended Petition for Writ of Habeas
25 Corpus under 28 U.S.C. § 2254 (ECF No. 28) is denied. A certificate of
26 appealability is denied.

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1 The Clerk of the Court is directed to substitute Nethanjah Breitenbach for
2 Respondent Timothy Filson, enter judgment, and close this case.

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4 Dated this 25th day of March 2025.

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8 ANNE R. TRAUM
9 UNITED STATES DISTRICT JUDGE
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